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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1637

R. B. ROBINSON, INDIVIDUALLY AND AS NEXT OF FRIEND OF C. K. ROBINSON, A MINOR; AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF ALL SETTLORS AND NATURAL PERSON BENEFICIARIES OF TRUSTS,

Petitioner,

vs.

STANLEY T. KUSPER, COUNTY CLERK OF THE COUNTY OF COOK, ET AL.,

Respondents.

REPLY.

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REPLY.

I.

RESPONDENT FINDS NO SUPPORT IN THE RECORD FOR HIS CONTENTION THAT THE ILLINOIS SUPREME COURT'S OPINION DID NOT DEPRIVE PETITIONER OF HER PROPERTY WITHOUT DUE PROCESS OF LAW.

The respondent's brief in opposition on the issue of due process is predicated exclusively on the legal principle that a mere difference of opinion in the interpretation of a statutory enactment does not constitute a violation of due process, which he attempts to support solely by extensive quotations from the prior opinions of the Illinois Supreme Court with secondary references to statutory rules of construction and the debates of

the Illinois Constitutional Convention whose proceedings were terminated prior to the mailing of the official Report to the people stating that trusts were exempt.

The respondent endeavors to support his claim that Petitioner's Statement of the Case is "incomplete in certain essential respects." by quoting exclusively from the prior Illinois Supreme Court's opinions which relied on Senate Joint Resolution 67, without any reference to supporting factual data in the record. It is this very inability to square the opinions of the Illinois Supreme Court with the record which leads to petitioner's claim that the court's action was arbitrary and capricious. Nowhere does the respondent deny or refute petitioner's factual allegations which are the basis of her claim, namely that:

1) It was the Illinois General Assembly (not a minority thereof) which refused to approve the official Report until it had been corrected to read that personal property "owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by corporations, [trusts,] etc., is subject to taxes" (added language underlined, deleted language in brackets).

2) The approved corrected Report, pursuant to the requirements of law, was published in pamphlet form (Blue Pamphlet) by the Illinois Secretary of State and mailed to every registered voter prior to the general election of November 3, 1970.

3) Senate Joint Resolution 67 was adopted by a *minority* of the General Assembly and did not purport to be adopted either pursuant to or in accordance with Section 2 of Article XIV of the Illinois Constitution of 1870 or with the provisions of the act regarding the manner of submitting constitutional amendments to the voters.

4) Senate Joint Resolution 67 was adopted subsequent to the adoption of the corrected Report by the Illinois General Assembly.

5) Senate Joint Resolution 67 was never mailed to the electorate and the contents of said resolution were never made known to petitioner or to the electorate in any manner whatsoever prior to the election at which Article IX-A was adopted by the voters.

6) Petitioner read the official pamphlet mailed to her and other Illinois voters which specifically stated in the portion of the pamphlet devoted to arguments against the proposed amendment, that personal property "owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes;".

The respondent seeks to find his sole refuge in statements emanating from the Illinois Supreme Court which have no foundation in the facts and are nowhere supported in the record.

It is apparent from the Illinois Supreme Court's statement in the instant case that "It is unnecessary to reexamine these matters here." (*American National Bank and Trust Co.* v. *Kusper*, 69 Ill. 2d 374. See Appendix p. A. 17) that the error the Illinois Supreme Court persists in, and which deprives Petitioner of her property without due process of law, is the Court's continued reliance on Senate Joint Resolution 67. In the *Lake Shore Auto Parts Co.* v. *Korzen* decisions, the Illinois Supreme Court concluded in the language of Senate Joint Resolution No. 67 (A. 44-45) that "the meaning of Article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited," (49 Ill. 2d 137 at 148 and 54 Ill. 2d 237 at 239) and therefore, concluded that "Trustees and other fiduciaries, . . ., do not own property as natural persons, and they were not exempted from taxation by Article IX-A" (54 Ill. 2d 237 at 239).

The Respondent's Brief In Opposition at pages 10 and 11 quotes from the opinion of the Illinois Supreme Court in

Hanley v. *Kusper*, 61 Ill. 2d 452 (1975) as to why the Illinois Supreme Court refused to rely on the Official Report of the Illinois General Assembly and instead relied upon the Explanation and Senate Joint Resolution No. 67 in construing Article IX-A as follows:

> ". . . [T]he court is not justified in relying upon arguments against a proposed constitutional amendment 'as seen by the minority' to determine its meaning after adoption". (Hanley v. Kusper, 61 Ill. 2d 452 at 460.)

The Illinois Supreme Court and the State's Attorney are in error.

First, they are mistaken when they refer to the statement as being an argument against "as seen by the minority". The entire Illinois General Assembly, and not just a minority thereof, refused to adopt a report which stated that trusts were taxable, and, instead, approved the report only after the report had been corrected to state that trusts were exempt from personal property taxation. The Illinois Supreme Court's reference to the arguments against portion of the report as being an argument advanced by a minority of the Illinois General Assembly is, therefore, clearly erroneous.

Second, it was erroneous for the Illinois Supreme Court to state that it cannot rely on arguments against the proposition *to determine its meaning after adoption*. The arguments against the proposal, as well as the explanation of the proposal and arguments in favor of the proposal were all submitted by the Illinois General Assembly to the electorate prior to the electorate's adoption of Article IX-A, and the entire "Blue Pamphlet" must be given effect in construing Article IX-A. Obviously, a proposition to amend the constitution is but a proposal proffered by the General Assembly to the electorate to either adopt or to reject as the electorate, by its vote, determines.

Third, the Illinois Supreme Court's statement that it is not justified in relying upon "arguments" shows a fundamental mis-

understanding of the nature of the argumentation form of presentation. The statement of the Illinois General Assembly that personal property "which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by a corporation, etc. is subject to taxes" is a clear and precise statement of fact devoid of any possible ambiguity. It was this factual statement from which the argument followed, namely, that the proposal was discriminatory because it exempted individuals and trusts for the benefit of individuals while continuing to tax corporations and like entities. For the Respondent to argue that "the meaning of Article IX-A was uncertain to . . . . the 76 General Assembly . . . ." and that there was a "lack of any legislative history as to Article IX-A's meaning. . . ." is directly contrary to the facts, and is contradictory of the official journals of both the House and Senate of the 76th Illinois General Assembly relating to the adoption of the corrected report, and is directly contradictory to the sworn Affidavits of both the Republican and Democratic leaders of the Illinois Senate (Appendix p. A 57-58) who were responsible for the introduction of the proposed constitutional amendment adding Article IX-A, and is directly contrary to the sworn Affidavit of the member of the Illinois House (Appendix p. A 53-55) who submitted the corrected report to the 76th Illinois General Assembly for its approval, all of which provide the strongest evidence that the Illinois General Assembly, as it specifically so stated, intended that trusts for the benefit of natural persons be exempt. See *TVA* v. *Hill*, ... U. S. ....., 57 L. Ed. 2d 117 (Advance Sheet No. 1) decided on June 15, 1978 wherein this Court recognized its duty to give effect to the plain intent of an Act of Congress.

It is important to note that the delegates to the constitutional convention obviously *did not have* available to themselves at their meetings of June 19, June 25, June 30, August 8 and August 9, 1970 copies of the official pamphlet as the same was not mailed to the voters until the first of September 1970,

at the earliest. Likewise, it is apparent that they could not have had the legislative record of the adoption of the corrected report, otherwise some reference would have had to have been made to it in their debates and there would have been no uncertainty as to the exemption of traditional trusts. In any event, what the constitutional convention delegates thought or did not think about the issue is wholly immaterial as to legislative intent and voter understanding, which alone are to be considered in construing constitutional amendments.

For the Illinois Supreme Court to conclude, in its present opinion and in three prior opinions, that personal property *"which is held in a fiduciary capacity for the benefit of natural persons"* is taxable, despite the General Assembly's statement to the contrary in the Blue Pamphlet sent to the voters, is to state that a coordinate branch of government purposely set out to mislead and misinform the petitioner.

The Brief In Opposition also relies on the Illinois Supreme Court's statement in *Hanley* v. *Kusper*, 61 Ill. 2d 452, at 460, that none of the Plaintiffs analyzed the key words of the Explanation of the proposed amendment which stated that Article IX-A would not affect personal property taxes "levied against corporations and other entities not considered in law to be individuals." Contrary to the Court's statement, the Petitioner read not only the explanation but the entire contents of the official Report and concluded that the obvious purport of the language in the explanation was that the exemption would not apply to the tax levied against corporations and other like business entities not considered in law to be individuals. In this respect, it should be noted that the "Explanation of the Amendment" in the official Report mailed to the electorate appeared at the end of the Report after the electorate had been advised that personal property "owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes;" (Appendix p. A. 39-44 at A. 43.) A traditional trust for a natural person whose purpose is not the operation of a business for profit cannot be said to be an entity comparable to a corporation.

For the reasons heretofore noted in the Petition for a Writ of Certiorari and in this Reply to the Brief In Opposition, we respectfully submit that the property of the Petitioner, and the property of all settlors and natural persons who are beneficiaries of trusts in Illinois have been taken without due process of law. If, as held by this Court in *Bouie* v. *Columbia*, 378 U. S. 347 (1964) where the defendants were deprived of due process of law by a decision of the Supreme Court of South Carolina which held that the acts of the defendants in remaining on the premises of another receiving notice to leave fell within a statute prohibiting "entry upon the lands of another. . . . after notice from the owner or tenant prohibiting such entry. . . .", then certainly, a person's due process rights have been violated where a person creates a trust after having been specifically advised by the legislature that trusts are exempt from personal property taxation and a State Court refuses to give effect to the expressed intent of the legislature and of voter understanding and holds such trusts not to be exempt.

II.

PETITIONER HAS NOT WAIVED THE IMPAIRMENT OF CONTRACT ISSUE AND PETITIONER'S CONTRACT RIGHTS HAVE BEEN IMPAIRED.

A. Petitioner Has Not Waived the Impairment of Contract Issue:

The Respondent urges that the Petitioner has waived her right to urge the impairment of contract issue.

The simple answer to the Respondent's contention is that the Petitioner herein was neither a party to nor represented by a party in any of the prior cases in the Illinois Supreme Court, none of the parties to the prior cases having created a trust in reliance on the Illinois General Assembly's statement that trusts for natural persons would be exempt if Article IX-A were adopted by the People of Illinois.

At page 20 of Respondent's Brief in Opposition, it is stated:

> "In short, by failing to raise the issue in any prior proceeding in Illinois, thereby precluding the Illinois Supreme Court from considering the question, *petitioner's counsel* is barred under the doctrine of waiver from raising the issue now for the first time." (Emphasis Added.)

The fact that Petitioner's counsel in this case was involved as an attorney in *Hanley* v. *Kusper*, 61 Ill. 2d 452, in which this Petitioner was not a party nor represented by a party in no way bars the Petitioner from raising the issue of impairment of contract herein. Nor can it be said that Petitioner should have raised this issue in the State Court in the instant case unless it can be said that Petitioner should have anticipated that the Illinois Supreme Court would hold trusts for natural persons not exempt from taxation despite the express statement of the Illinois General Assembly to the contrary. This is exactly what this Court held in *Bouie* v. *Columbia*, 378 U. S. 347 could not be anticipated, and was the very reason this Court held due process rights violated in *Bouie*.

We respectfully submit, therefore, that the issue of impairment of contract rights did arise for the first time by reason of the decision of the Illinois Supreme Court in the instant case, and that Petitioner is not barred from having this Court pass on such issue.

B. Petitioner's Contract Rights Have Been Impaired.

Petitioner, in her Petition For a Writ of Certiorari, noted that if the Illinois General Assembly had adopted Senate Joint Resolution No. 67 *subsequent to* December 23, 1970, when Petitioner created her trust in reliance upon the prior official Report of the Illinois General Assembly which stated that trusts for natural persons were exempt from personal property taxation under Article IX-A, that there would have arisen a classic issue of whether the Illinois General Assembly by subsequent legislative action had impaired the obligation of a contract.

Petitioner asserted, and reasserts, that a clear cut issue of impairment of contract remains where the subsequent legislative actions on which the Court relied and which gave rise to the impairment was in the form of a Resolution to which the Illinois Supreme Court gave the effect of law, and which was never made known to Petitioner or to the Illinois electorate. Unless citizens are to be charged, as a matter of law, with a knowledge of legislative action shown only on the official journals of state legislatures but not communicated or otherwise made known to its citizens, then such subsequent legislative action can be utilized in the future by legislative bodies as a form of entrapment for the unwary citizen who relies upon prior legislature action communicated to the electorate but negated by subsequent legislative activity not communicated to or made known to its citizens prior to the citizen taking action in reliance upon the prior legislative activity.

The fact that citizens are not charged with knowledge of legislative action shown only on the official journals of the State legislature has been recognized by the Illinois Supreme Court in *Worthy* v. *Bush*, 262 Ill. 560 (1914) when the Court stated at page 562:

> "It has never been the doctrine of this court that judicial notice will be taken of the contents of these legislative journals."

We respectfully submit that if a State legislature by such a course of action can evade the constitutional guaranty against impairment of contract, then the constitutional guaranty becomes meaningless.

Respondent's statement at page 22 of the Brief in Opposition that the authority of this Court does not reach mere errors committed by a state court when passing on the validity or effect of a contract under the laws in existence when it was made has no application whatsoever where subsequent legislative action is given effect by a Court which impairs the obliga-

tion of contract. The case cited in Respondent's Brief in support of this argument, *Cross Lake Shooting & Fishing Club* v. *State of Louisiana,* 224 U. S. 632 specifically holds to the contrary, noting at page 639 of its opinion that "when the State Court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract what obligations arose from it, and whether they are impaired by the subsequent law." (224 U. S. 632 at 639).

The Illinois Supreme Court, in construing Article IX-A, has refused to give effect to the prior official report mailed to the electorate, which specifically stated that trusts for natural persons were exempt, and, in so doing, had indisputably relied on the subsequently adopted Senate Joint Resolution No. 67, thereby giving it the effect of law.

Repeated decisions of this Court have held, that while decisions of state courts are entitled to great respect, this Court itself must construe the contract to determine whether or not legislation impairs the obligations of contract. In *Terre Haute & I. R. Co.* v. *Indiana,* 194 U. S. 579 (1904) this Court, in overruling the construction given to a charter by a state Court, concluded at page 587:

> "We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a state court upon state laws."

Prior to reaching such conclusion, this Court had previously noted:

> "Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For in order to determine whether the later legislation impairs those rights, *this court must decide for itself what those rights were.*" (Emphasis Added) (194 U. S. 579 at 587.)

For similar decisions of this Court so holding, see: *New York Rapid Transit Corporation* v. *New York,* 303 U. S. 573, 593 (1938); *Columbia Railway, Gas & Electric Co.* v. *South Carolina,* 261 U. S. 236, 246, 247 (1923); *Yazoo & Mississippi Valley Railroad Company* v. *Adams,* 180 U. S. 41, 44 (1901); *Wilson* v. *Standefer,* 184 U. S. 399, 411, 412 (1902); and *Mobile & Ohio R. Co.* v. *State of Tennessee,* 153 U. S. 486, 492, 493 (1894).

As previously noted in the Petitioner's Petition for a Writ of Certiorari; this Court, on numerous occasions, has noted that if this Court were bound by decisions of State Courts construing contract rights and whether the same were impaired by subsequent legislation, there would never be a case in which this Court could pass on alleged impairment of such rights.

We respectfully request this Court to declare Senate Joint Resolution No. 67 unconstitutional, null and void as being subsequent legislative activity impairing the obligation of contract. In so doing, the Illinois Supreme Court will no longer be able to rely upon Senate Joint Resolution No. 67 in construing Article IX-A and will, we respectfully submit, be forced to give effect to the Official Report of the Illinois General Assembly which specifically advised the electorate that personal property which is "held in a fiduciary capacity for the benefit of natural persons is exempted from taxes" under Article IX-A. Only then will the clear legislative intent and voter understanding to exempt trusts for the benefit of natural persons have been realized.